

**LIBRARY**

**SUPREME COURT. U. S.**

U.S. Supreme Court, U.S.

**FILED**

**MAR 4 1968**

**JOHN F. DAVIS, CLERK**

**IN THE  
SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1968**

No. ....

**38**

**JAMES G. GLOVER et al.,  
Petitioners,**

**v.**

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,  
Respondents.**

**On Petition for Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

**PETITION FOR WRIT OF CERTIORARI.**

**WILLIAM M. ACKER, JR.,  
LYNN G. BALDWIN,  
600 Title Building,  
Birmingham, Alabama 35203,**

**CARL ISAACS,  
Woodward Building,  
Birmingham, Alabama 35203,  
Attorneys for Petitioners.**

**Of Counsel:**

**SMYER, WHITE, REID & ACKER,  
600 Title Building,  
Birmingham, Alabama 35203.**

## INDEX.

|   | Page |
|---|------|
| Prayer .....  | 1    |
| The opinion below .....   | 2    |
| Jurisdiction .....  | 2    |
| Questions presented .....   | 2    |
| Statute involved .....  | 3    |
| Statement of the case .....   | 3    |
| Reasons for granting the writ: Argument .....                                   | 6    |
| Recapitulation .....  | 46   |
| Conclusion .....  | 48   |
| Certificate of service .....  | 50   |
| Appendix:   |      |
| Opinion of United States Court of Appeals for the<br>Fifth Circuit .....        | 51   |
| Judgment of the Court of Appeals .....  | 52   |
| Printed Record of proceedings in the District Court                             | 53   |
| Complaint .....   | 54   |
| Motion to Dismiss, by St. Louis-San Francisco<br>Ry. Co. ....                   | 59   |
| Motion to Dismiss, by Brotherhood of Railway<br>Carmen of America .....         | 61   |
| Amended Motion to Dismiss, by St. Louis-San<br>Francisco Ry. Co. ....           | 62   |
| Amended Motion to Dismiss, by Brotherhood of<br>Railway Carmen of America ..... | 64   |

|   |    |
|---|----|
| Memorandum Opinion .....  | 65 |
| Order in Conformity with Memorandum Opinion<br>to Dismiss Action .....                | 67 |
| Motion to Set Aside or to Amend Order of Dis-<br>missal .....                         | 67 |
| Order Granting Leave to Amend Complaint ....  | 68 |
| Amendment to Complaint .....  | 69 |
| Motion to Dismiss Amendment to Complaint and<br>to Adhere to Order of Dismissal ..... | 71 |
| Motion to Dismiss Amendment to Complaint ....   | 73 |
| Order Dismissing Motion to Dismiss Amended<br>Complaint .....                         | 74 |
| Notice of Appeal .....  | 75 |
| Appeal Bond .....   | 76 |
| Clerk's Certificate .....   | 77 |

### Cases Cited.

|  |        |
|--|--------|
| Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So.<br>2d 98 (1957) .....   | 24     |
| Associated Orchestra Leaders of Greater Philadelphia<br>v. Philadelphia Musical Society, Local 77, of the<br>Amer. Fed. of Musicians, 203 F. Supp. 755 (D. C.<br>E. D., Pa., 1962) ..... | 10     |
| Brotherhood of Railroad Trainmen v. Central of Ga.<br>Ry. Co., 305 F. 2d 605 (5th Cir., 1962) .....  | 34, 47 |
| Calagaz v. Calhoun, 309 F. 2d 248 (5th Cir., 1962) ..  | 13, 16 |
| Choate v. Grand International Brotherhood of Loco-<br>motive Engineers, 159 Tex. 1, 314 S. W. 2d 795<br>(1958) .....   | 33, 35 |
| Coats v. St. Louis-San Francisco Railway Co., 230 F.<br>2d 798 (5th Cir., 1956) .....  | 39     |

|  |                    |
|--|--------------------|
| Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80 (1957) .....  | 29, 31, 34, 35, 46 |
| Cunningham v. Erie R. R. Co., 266 F. 2d 411 (2nd Cir. 1959) .....  | 33                 |
| Desrosiers v. American Cyanamid Co., 377 F. 2d 864 (2d Cir., 1967) .....   | 23, 47             |
| Detroy v. American Guild of Variety Artists, 286 F. 2d 75 (2nd Cir., 1961), cert. denied 366 U. S. 929, 81 S. Ct. 1650, 6 L. ed. 2d 388 (1961) ..... | 11, 15, 16         |
| Farowitz v. Associated Musicians of Greater New York, 330 F. 2d 999 (2nd Cir., 1964) .....   | 16                 |
| Fingar v. Seaboard Air Line Railroad Company, 277 F. 2d 698 (5th Cir., 1960) .....   | 13                 |
| Forline v. Helpers Local No. 42, 211 F. Supp. 315 (D. C. E. D., Pa., 1962) .....   | 10                 |
| Foy v. Norfolk & W. R. Co., 377 F. 2d 243 (4th Cir., 1967) .....   | 18                 |
| Hayes v. Union Pacific R. Co., 184 F. 2d 337 (9th Cir., 1950) .....  | 31                 |
| Haynes v. U. S. Pipe & Foundry Co., 362 F. 2d 414 (5th Cir., 1966) .....   | 7                  |
| Hosteller v. Brotherhood of Railroad Trainmen, 287 F. 2d 457 (4th Cir., 1961) .....  | 34                 |
| Howard v. St. Louis-San Francisco Railway Company, 361 F. 2d 905 (8th Cir. 1966) .....   | 47                 |
| King v. Randazzo, 234 F. Supp. 388 (E. D. N. Y. 1964), affirmed and modified on other grounds at 346 F. 2d 307 (2nd Cir., 1965) .....                | 14                 |
| Libutti v. Di Brizzi, 337 F. 2d 216 (2nd Cir., 1964) (opinion adhered to on rehearing, 343 F. 2d 460) .....  | 14, 18             |
| McGraw v. United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, 341 F. 2d 705 (C. A., Tenn., 1965) .....           | 16                 |

|   |                    |
|---|--------------------|
| Milstead v. Atlantic Coast Line R. Co., 273 Ala. 557,<br>142 So. 2d 705 (1962), cert. denied 83 S. Ct. 189,<br>371 U. S. 892, 9 L. ed. 2d 124 (1962) .....                        | 24                 |
| Moore v. Illinois-Central R. Co., 312 U. S. 630, 61<br>S. Ct. 754, 85 L. ed. 1089 (1941) .....  | 26                 |
| Mount v. Grand International Brotherhood of Loco-<br>motive Engineers, 226 F. 2d 604 (6th Cir. 1955),<br>cert. den., 350 U. S. 967, 76 S. Ct. 436, 100 L. ed.<br>839 (1956) ..... | 29                 |
| Neal v. System Board of Adjustment, 348 F. 2d 722<br>(8th Cir., 1965) .....   | 7, 8, 11           |
| Pennsylvania Railroad Co. v. Day, 360 U. S. 548, 79<br>S. Ct. 1322, 3 L. Ed. 2d 1422 (1959) .....   | 41, 44             |
| Pennsylvania Railroad Co. v. Rychlick, 353 U. S. 480,<br>77 S. Ct. 421, 1 L. ed. 2d 480 (1957) .....  | 28, 40, 41         |
| Rensch v. General Drivers Helpers and Trust Ter-<br>minal Employees, Local No. 120, 129 N. W. 2d 341<br>(1964) .....  | 17                 |
| Republic Steel Corp. v. Maddox, 379 U. S. 650, 85<br>S. Ct. 614, 13 L. ed. 2d 580 (1965) .....  | 12, 18, 24, 46     |
| Richardson v. Texas and New Orleans Railroad Co.,<br>242 F. 2d 230 (C. A. 5th, 1957) .....  | 31, 33, 47         |
| Simmons v. Avisco, Local 713, Textile Workers Union,<br>350 F. 2d 1012 (4th Cir., 1965) .....   | 17                 |
| Slocum v. Delaware L&W R. Co., 339 U. S. 239, 70<br>S. Ct. 577, 94 L. ed. 795 (1950) .....  | 26, 38             |
| Steele v. Louisville & Nashville R. Co., 323 U. S. 192,<br>65 S. Ct. 226, 89 L. ed. 173 (1944) .....  | 26, 28, 35, 38     |
| Thomas v. The Penn Supply and Metal Corporation,<br>35 F. D. R. 17 (D. C., E. D., Pa., 1964) .....  | 11                 |
| Thompson v. New York Central Railroad Co., 250<br>F. Supp. 175 (S. D. N. Y. 1966) .....   | 12, 14, 15, 17, 35 |
| Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed.<br>749, 50 A. L. R. 1243 (1927) .....  | 38                 |

|  |                |
|--|----------------|
| Vaca v. Sipes, 386 U. S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903 (1967) .....   | 20, 21, 22, 31 |
| Wade v. Southern Pacific Co., 243 F. Supp. 307 (S. D., Texas, 1965), rehearing, 248 F. Supp. 493 (1965) .....  | 7, 8, 9, 11    |
| Walker v. Southern R. Co., 385 U. S. 196, 17 L. ed. 2d 294, 87 S. Ct. 365 (1966), Rehearing Denied 385 U. S. 1020, 17 L. ed. 2d 559, 87 S. Ct. 699 ..... | 24             |

#### Statutes Cited.

|                                      |        |
|--------------------------------------|--------|
| 28 U. S. C., § 1254 (1) .....        | 2      |
| 29 U. S. C., § 411 (a) (4) .....     | 12, 14 |
| 42 U. S. C., § 2000 e .....          | 4      |
| 45 U. S. C., § 153 (g) .....         | 25, 38 |
| 45 U. S. C., § 153 (First) (i) ..... | 3      |

#### Journals and Reviews Cited.

|  |        |
|--|--------|
| 4 Labor Law Journal 685, 696 (1953), Levinson, "Legal Aspects of the National Railroad Adjustment Board" .....                                   | 36, 39 |
| 15 Alabama Law Review 626, Spring 1963 .....   | 24     |
| 24 Maryland Law Review 113 (1964), Herring, "The 'Fair Representation' Doctrine: an Effective Weapon Against Union Racial Discrimination?" ..... | 20     |
| 37 N. Y. U. Law Review 41 (1962), Kroner, "Minor Disputes Under the Railway Labor Act: A Critical Appraisal" .....                               | 36     |
| 37 N. Y. U. Law Review 362 (1962), Summers, "Individual Rights in Collective Agreements and Arbitration" .....                                   | 19, 36 |
| 44 Illinois Law Review 429 (1949), "Statutory Regulation of Internal Union Affairs—I" .....  | 46     |
| 46 Yale Law Journal 567, 577, 598 (1937), Garrison, "The National Railroad Adjustment Board—A Unique Administrative Agency" .....                | 38, 44 |

|  |    |
|--|----|
| 50 Northwestern Law Review 143 (1955), "Report of<br>Committee on Improvement of Administration of<br>Union-Management Agreements, 1954" ..... | 19 |
| 54 Northwestern Law Review 605 (1959-1960), "Ex-<br>haustion of Remedies Under Collective Bargaining<br>Agreements: a Reappraisal" .....       | 19 |
| 62 Columbia Law Review 563 (1962), "The National<br>Labor Relations Act and Racial Discrimination" ..  | 44 |

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

---

OCTOBER TERM, 1967.

---

No. ....

---

**JAMES G. GLOVER et al.,**  
Petitioners,

v.

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,**  
Respondents.

---

On Petition for Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.

---

**PETITION FOR WRIT OF CERTIORARI.**

---

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam J. Gugliotta, by their attorneys, respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on December 5, 1967.

### **THE OPINION BELOW.**

The opinion of the United States Court of Appeals for the Fifth Circuit in question, rendered December 5, 1967, is reported at 386 F. 2d 452 (5th Cir., 1967). A full, true, and correct copy of the opinion and judgment thereon is appended hereto (Appendix pp. 51, 52). The complete record of proceedings in the United States District Court for the Northern District of Alabama, Southern Division, is also appended hereto (Appendix pp. 53 through 77).

### **JURISDICTION.**

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., § 1254 (1).

### **QUESTIONS PRESENTED.**

This case involves racial discrimination in employment practices. The primary issue is whether or not petitioners, as railroad employees, must exhaust to an endless end three separate supposed administrative remedies before bringing suit in the Federal Courts when petitioners have alleged facts showing that an attempt to exhaust the remedies was made and that all remedies are futile and inadequate. The courts below agreed with the "hand-in-glove" contentions of Company and Union that the doors of the Federal Courts are closed because petitioners have not taken their grievance through all stages of the supposed internal grievance machinery of the Brotherhood Constitution, through all stages of the grievance machinery set up in the contract, and through the procedures of the National Railroad Adjustment Board. If the Court of Appeals is correct in requiring an exhaustion of all three of these alleged remedies, secondary problems and issues appear, i. e., the proper order in which the said remedies should be exhausted, and who has

the burden of pleading and proving (a) the existence of administrative remedies and (b) a failure to exhaust such administrative remedies.

### **STATUTE INVOLVED.**

A portion of the Railway Labor Act is involved. It is 45 U. S. C., § 153 (First) (i), which reads as follows:

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

### **STATEMENT OF THE CASE.**

Petitioners invoked the jurisdiction of the District Court because of diversity of citizenship of the parties, because there is a federal question involved, and because the damages claimed exceeded Ten Thousand (\$10,000.00) Dollars. The original complaint (Appendix pp. 54-59) charged that respondents, St. Louis-San Francisco Railway Company, and Brotherhood of Railway Carmen of America, have between them a tacit understanding and subrosa agreement to use white so-called "apprentices," to perform the work of "carmen" in order to keep from providing petitioners, who are classified as "carmen helpers," enough hours as "carmen" to permit promotion

to "carmen" as called for by the contract. The reason for this scheme is to deprive the Negro petitioners of job promotion. It has the incidental and secondary result of denying the same promotion opportunity to the white petitioners who happen to stand on the "carmen helper" seniority roster behind the Negro petitioners. Petitioners, Negro and white together, seek an end to this discrimination, and further seek to recover the lost wages resulting from past discrimination. On motions to dismiss, which were unaccompanied by any affidavit or pleading showing the structure, or even the existence, of internal grievance procedure (Appendix pp. 59-64), the District Court wrote on opinion (Appendix pp. 65-66). The District Court dismissed the action on the ground that petitioners "have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board (Appendix p. 65). The Trial Court went on to say:

The conclusory averment that, because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace (Appendix p. 66).

Then going outside of the record, the District Court parenthetically noted that Mr. Dent (one out of the fourteen plaintiffs) had a pending suit under Title 7 of the Civil Rights Act, 42 U. S. C. A., § 2000 e, asking for what the court described as "identical relief" (Appendix p. 66). The court apparently placed no reliance on this fact, in rendering its decision, and the statement that the relief sought was identical is patently incorrect. Furthermore, since the opinion of the District Court in the instant

case, the same court has also dismissed the Dent case brought under the Civil Rights Act for the alleged failure of the Equal Employment Opportunity Commission to invoke conciliation procedures. That case, with completely different counsel for Mr. Dent, is now on appeal to the Fifth Circuit.

After the decree dismissing the original complaint, petitioners, by permission (Appendix pp. 67-69), amended their complaint, adding the following averments to further demonstrate the factual futility of their attempts to employ the collective bargaining machinery and the so-called internal grievance procedures of the Brotherhood:

7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation," nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed," but never taken seriously.

When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company . . . . (Appendix pp. 69-71).

Following the amendment of the complaint, and upon motions to dismiss, the District Court found that the amendment did not cure the defect of non-exhaustion of administrative remedies and dismissed the action (Appendix p. 74). On appeal to the Court of Appeals, that court agreed with the opinion of the District Court (Appendix p. 51).

## **REASONS FOR GRANTING THE WRIT:**

### **ARGUMENT.**

Neither the District Court nor the Court of Appeals bothered to suggest which of the proposed administrative remedies petitioners should employ first in the long and devious road described as the only road to relief. They simply held that petitioners must exhaust **all three remedies** (Appendix p. 65). The original complaint does not even allege that there actually exists an administrative remedy within the Frisco or within the Brotherhood. It referred to "remedies, if any" (Appendix p. 58) (emphasis supplied). And yet, the opinion of the District Court, without any reference to affirmative proof by defendants of the existence of real administrative remedies, **facilely jumps** to the conclusion that as a matter of fact such remedies exist. It makes sense, of course, for a court to take judicial knowledge of the National Railroad Ad-

justment Board and of its jurisdiction, but how the District Court and the Court of Appeals concludes that these other two remedies are available without affirmative proof, remains unanswered. As it stands now, petitioners have been admonished to go three separate and long administrative routes, none of which holds any prospect of success, it being anyone's guess which route to follow first.

In this posture, it is necessary to examine the law generally with regard to the exhaustion of contractual administrative remedies, and separately the N. R. A. B., which is statutory. There is a definite distinction between contractual remedies (such as intra-union procedures, and those provided by collective bargaining agreements) and an N. R. A. B. complaint. Thus, a separate examination of these two types of remedies will be made.

#### **The Exhaustion of Company and Union Grievance Machinery:**

The District Court grounded its decision on **Neal v. System Board of Adjustment**, 348 F. 2d 722 (8th Cir., 1965), on **Wade v. Southern Pacific Co.**, 243 F. Supp. 307 (S. D., Texas, 1965), and on rehearing, 248 F. Supp. 493 (1965), and on **Haynes v. U. S. Pipe & Foundry Co.**, 362 F. 2d 414 (5th Cir., 1966).

The **Haynes** case is easily distinguishable on the ground that appellant in that case had exhausted his administrative remedies, did not contend that the Union had not faithfully represented him, and did not charge fraud or collusion on the part of the Union and the Company.

While the **Neal** and **Wade** cases may at first glance appear to hold that contractual and internal union remedies are inevitable prerequisites to court action, both cases provide an exception here applicable. In the **Neal** case, the court at page 726 of 348 F.2d, stated:

With these internal remedies so definitely available, resort to them, or an adequate reason for failure so to do, is a prerequisite to equitable relief against the union or its officers in federal courts (emphasis supplied).

In the **Neal** case the constitution of the union had been introduced. The constitution is not presented in the instant case. Apparently no "adequate reason for failure" to pursue such a remedy was alleged, argued, or even existed in **Neal**.

In the **Wade** case, the Texas District Court found as a fact, and stated at page 311 of 243 F. Supp.:

Plaintiffs have made no effort whatsoever to present a grievance through these procedures [those provided by the collective bargaining agreement] (emphasis supplied).

Nevertheless, the very last paragraph of the opinion in **Wade**, and the final holding, raise questions as to what an employee must do, as well as the question as to whether employee or defendant bears the burden of proving what the employee did or did not do. That court at page 313, said:

Therefore, upon the submission by the defendants of evidence that (1) contract grievance procedures existed which the plaintiffs did not request the union to pursue on their behalf, and/or (2) that internal union grievance procedures existed and although the union was requested to process the employee's grievance, which it failed to do, the employee did not pursue a complaint for failure to do so against the union through its internal grievance procedure, the Court will act upon the defendants' motion to dismiss (emphasis supplied).

From the **Wade** case it would appear only that an employee must "request" or make an "effort" to pursue

contractual remedies. The case does not say that the "request" or "effort" must be carried to a logical and final conclusion (or an illogical conclusion, depending upon the viewpoint). Petitioners in the instant case did allege that they made an effort and made a request of the Brotherhood, and furthermore that the Brotherhood refused to process any grievance and even laughed at plaintiffs. If **Wade** means that an employee must also pursue his complaint against the Union through its internal procedure, Petitioners must admit that they did not allege facts showing a full scale exhaustion of themselves within the morass of any such internal Union machinery, if it existed. Nevertheless, on the question of burden of proof, **Wade** indicates that the defendant union must "submit evidence . . . that internal union grievance procedures existed". In the instant case, the Brotherhood has submitted no such evidence. Neither the contract nor the constitution of the union has been introduced, and neither is a part of the record. As a matter of "off-the-record" fact, neither the contract nor the constitution of the Brotherhood contain any provision whereby a member may process a grievance without local Union support, and under the union constitution, any member who attempts to do so would be subject to revocation of his Union membership. Petitioners would be happy, if allowed to do so, to join issue on the question of practical availability of these remedies through a segregated "Jim Crow" local to which the Negro Petitioners belong. It would be unduly burdensome, however, for petitioners to attach to their complaint the entire Union Constitution and collateral facts in order to meet a fancied threshold requirement that they demonstrate the absence of complaint machinery in the Union. The **Wade** case is logical in placing such a burden on the defendant. The decision in the **Wade** case on rehearing, 248 F. Supp. 493 (1965), shows exactly what defendants were required to prove

We therefore construe the statute to mean that a member . . . **may** (emphasis ours) be required by **that court or agency** (emphasis theirs) to exhaust internal remedies . . .

In other words, whether or not a member must exhaust internal remedies is a matter of discretion with each court in each individual case, and neither statute nor case law is absolutely binding on a court in every case. See also **McGraw v. United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry**, 341 F. 2d 705 (C. A., Tenn., 1965).

The court in **Detroy** made an additional interesting comment at p. 81 of 286 F. 2d:

Taking due account of the declared policy favoring self-regulation by unions, we nonetheless hold that where the internal union remedy is **uncertain** and has not been **specifically brought to the attention of the disciplined party**, the violation of federal law clear and undisputed, and the injury to the union member immediate and difficult to compensate by means of a subsequent money award, exhaustion of union remedies ought not to be required (emphasis supplied).

In yet another case involving disciplinary action of a union member, **Farowitz v. Associated Musicians of Greater New York**, 330 F. 2d 999 (2nd Cir., 1964), Judge Lumbard used the following language at p. 1002:

it is clear that where there is reason to believe that resort to an appeal within the union would be a **futility** it is not necessary to follow such a course as a prerequisite to legal action (emphasis supplied).

As previously pointed out, the Fifth Circuit in **Calagas**, *supra*, concurred in using the word "futile." In the **Farowitz** case the Union attempted to discipline a member who had urged other members not to pay taxes and dues

assessed by the Union because the taxes and dues were illegal; and the assessment of the taxes and dues was, in fact, illegal. Under such circumstances an appeal through internal union procedures would be a futility, and the reviewing court so found. The same can readily be said in the instant case.

In **Simmons v. Avisco, Local 713, Textile Workers Union**, 350 F. 2d 1012 (4th Cir., 1965), the Fourth Circuit quoted Judge Lumbard verbatim (as the court in **Thompson v. New York Central**, *supra*, did) and said:

It has been held, both at common law and under the Act that internal union remedies need not be exhausted where the action taken by the union is "void". This rather elastic term has been applied to proceedings where no proper notice was given, where the tribunal was biased, where the offense charged was not one specified in the union constitution or where there have been other substantial jurisdictional defects, or a lack of fundamental fairness. As recognized by Chief Judge Lumbard in **Libutti** . . . , the concept of voidness lacks precision, and its use may necessitate a hearing on the merits before a ruling on exhaustion can be made. He (Lumbard) points out, however, that "(w)hen conceded or easily determined facts show a serious violation of the plaintiff's rights, the reasons for requiring exhaustion are absent" (emphasis supplied).

In **Rensch v. General Drivers Helpers and Trust Terminal Employees, Local No. 120**, 129 N. W. 2d 341 (1964), suit was brought in a Minnesota state court against the Union for breach of an employment contract. As to the requirement of exhaustion of internal remedies the Supreme Court of Minnesota said at p. 346 of 129 N. W. 2d:

However, the purposes of the rule are not served when the remedies are **inadequate** . . . even though . . . available. To require exhaustion in such cases

would be to permit use of the rule as a defensive vehicle to avoid granting any relief to a member by adding delay and expensive . . . procedures . . . Where remedies are in fact not available to afford such relief, or where their availability is dependent upon a tortured or unjustified interpretation of the Constitution or by-laws, it is rather uniformly held that the remedies are **illusory** and need not be exhausted (emphasis supplied).

One of the most recent cases is **Foy v. Norfolk & W. R. Co.**, 377 F. 2d 243 (4th Cir., 1967), in which the Fourth Circuit joined in the recognition of the possibility of a showing of futility or that the remedies are inadequate in order to avoid their exhaustion as a prerequisite to suit.

In summary, there is much case law under the Railway Labor Act, under the Labor-Management Reporting and Disclosure Act, and under plain old common law, to the effect that contractual and internal grievance procedures do not have to be exhausted in all cases, and especially do not have to be exhausted where the remedy is wholly inadequate or where there is a "violation of a fundamental right," as in **Libutti v. Di Brizzi**, *supra*. It is noteworthy that not a single one of these cases stated reasons more cogent for not exhausting remedies than have been stated in the amended complaint in the instant case. Not a single case stated the "violation of a fundamental right" which is so basic and so important as the right to be free of racial discrimination in one's employment.

Petitioners believe that this Honorable Court would not have required exhaustion of the contractual remedy in **Republic Steel v. Maddox**, *supra*, if the claim had been one of racial discrimination. The **Maddox** case, decided in 1965, and relied upon heavily by Respondents in the Court of Appeals, was a simple suit by a discharged employee for back wages. There was no claim that his bargaining agent and company were "in cahoots". **Maddox** most certainly

did not involve a claim of racial discrimination by either Union or Employer, much less by Union and Employer. It was a case where the grievance machinery provided by the collective bargaining agreement could fairly operate. If Mr. Maddox had alleged facts showing racial discrimination by his Employer, participated in by his Union (circumstances where the grievance machinery could not fairly operate), Petitioners respectfully suggest that the result would have been different.

Few legal analysts would make a fetish of extra-judicial remedy exhaustion, as the lower courts have done here. In "Exhaustion of Remedies Under Collective Bargaining Agreements: A Reappraisal," 54 Northwestern L. Rev. 605 (1959-1960), the writer at p. 615 rightly concludes that:

... in order to promote fairness to the employee, the futility exception should be more liberally applied where the union and/or employer are either hostile or refuse to cooperate in the use of the grievance machinery.

Speaking of the inadequacy of grievance machinery without the Union's cooperation, the "Report of Committee on Improvement of Administration of Union Management Agreements, 1954," 50 Northwestern L. Rev. 143 (1955) at p. 168 says:

Beyond the first step, the grievance procedure usually makes no provision for the individual. The customary agreement provides that the appeal shall be taken by designated union officers to the next highest level of management. The agreement gives the individual no power to decide whether an appeal will be taken and no voice in presenting the appeal. The individual grievance, in such cases, can not follow the letter of the contractual grievance procedure.<sup>1</sup>

<sup>1</sup> See also 37 N. Y. U. L. Rev. 362 (1962), Summers, "Individual Rights in Collective Agreements and Arbitration", at

before their motion to dismiss was granted, and also shows how they proved it.

Another case which places the burden of proving the availability of internal Union grievance procedure on defendant is **Forline v. Helpers Local No. 42**, 211 F. Supp. 315 (D. C. E. D., Pa., 1962), decided under the Labor-Management Reporting and Disclosure Act. At page 317 of 211 F. Supp., that court said:

To effectuate those policies the issue of exhaustion of remedies should be disposed of as early in the proceedings as practicable. In appropriate cases it may be determined preliminarily upon motion, but it cannot be resolved in a vacuum. Where a union moves to dismiss the complaint, it should place before the Court facts (emphasis theirs) establishing that union remedies are available to the plaintiff and that plaintiff has neglected to use them. This may be accomplished in many ways, by means of exhibits, affidavits, depositions, etc. Defendants, here, however, have placed no facts in the record, they have merely attached to their brief what purports to be a copy of the union Constitution. The union Constitution has not been made part of the record, but even if it had, that document, in and of itself, falls short of establishing that plaintiffs have failed to take advantage of the available reasonable union procedures (emphasis supplied except where otherwise designated).

The motion to dismiss in the **Forline** case was denied without prejudice so as to allow the submission of proof that internal Union remedies did in fact exist.

Again in **Associated Orchestra Leaders of Greater Philadelphia v. Philadelphia Musical Society, Local 77, of the Amer. Fed. of Musicians**, 203 F. Supp. 755 (D. C. E. D., Pa., 1962), the defendant's motion to dismiss was denied on this same ground. The court said at page 760:

Nor have defendants pointed out to us any procedures specified in its Constitution or By-Laws whereby members aggrieved by such union action could secure relief.

The Pennsylvania District Court further cited the case of **Detroy v. American Guild of Variety Artists**, 286 F. 2d 75 (2nd Cir., 1961), cert. denied 366 U. S. 929, 81 S. Ct. 1650, 6 L. ed. 2d 388 (1961), in which Judge Lumbard denied defendant's motion to dismiss because the internal Union remedies had not been specifically brought to the attention of the union member, and because such remedies were, as he phrased it, "uncertain".

In **Thomas v. The Penn Supply and Metal Corporation**, 35 F. D. R. 17 (D. C., E. D., Pa., 1964), the court held at p. 19:

In this regard, the "Union" should, on a motion to dismiss the complaint, place before the Court facts to establish that union remedies are available and that plaintiffs have neglected their utilization. A copy of the Union Constitution attached to the "Union's" brief in support of their motion does not fulfill their obligation to present facts to the court which would establish plaintiff's failure to follow available, reasonable procedures. A failure would warrant dismissal, but such a failure must be shown by the moving party. **Bey et al. v. Muldoon et al.**, 217 F. Supp. 404 (E. D., Pa., 1963); . . . (emphasis supplied).

As in the **Neal** and **Wade** cases, *supra*, other courts leave the door of the courts ajar, if not wide open, by providing exceptions to the rule that contractual and internal remedies must be exhausted. The **Wade** case uses the words "request" and "effort". Other cases use other words, like "attempt," "futile," "illusory," "void," "uncertain," "inadequate," and "adequate reason for failure to do so." For example, in the case of **Republic**

**Steel Corp. v. Maddox**, 379 U. S. 650, 85 S. Ct. 614, 13 L. ed. 2d 580 (1965),<sup>1</sup> the Supreme Court said at p. 583 of 13 L. ed. 2d:

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must **attempt** (Court's emphasis) use of the contract grievance procedure agreed upon by employer and union as the mode of redress . . . And it cannot be said, **in the normal situation** that contract grievance procedures are **inadequate** to protect the interests of an aggrieved employee until the employee has **attempted to implement the procedures and found them so** (emphasis supplied except where otherwise designated).

One of the very latest cases on the subject uses yet another, and most interesting, word to describe a reason for not insisting on complete exhaustion of contract remedies. In **Thompson v. New York Central Railroad Co.**, 250 F. Supp. 175 (S. D. N. Y. 1966), plaintiffs sued the Brotherhood of Railway Carmen of America (Respondents here) and the New York Central Railroad and alleged unfair representation and hostile discrimination (but not racial), invoking the R. L. A. and also claiming they were unlawfully disciplined under the L. M. R. D. A. The court again stated that the general rule under the R. L. A. is that internal remedies must first be pursued and pointed out that the L. M. R. D. A., 29 U. S. C., § 411 (a) (4) expressly provides that a Union may require its members to exhaust internal remedies before seeking redress in the courts. Nevertheless, the court stated at p. 176:

Plaintiffs are excused from exhaustion of internal union remedies under the R. L. A. when they allege facts to sustain a finding that it would be **futile** to do so (emphasis supplied).

<sup>1</sup> Cited by the Court of Appeals in its opinion of December 5, 1967.

Since none of these cases shed much light on the breadth of such words as "futile," "attempt," "request," "uncertain," or "an adequate reason for failure to resort to internal remedies," as excuses for avoiding administrative procedures, Petitioners respectfully point to several cases which may shed more light. The following cases, although not always on point factually, are some of the cases which have excused the exhaustion of internal remedies or have held that such exhaustion was unnecessary.

In **Fingar v. Seaboard Air Line Railroad Company**, 277 F. 2d 608 (5th Cir., 1960), upon which Respondents in the instant case have relied, the Fifth Circuit indicated what the plaintiffs in that case should have alleged. The case involved discrimination, but not racial discrimination. The Court of Appeals said at p. 701:

There was no allegation that an appeal (under the Union's Constitution) to the General Committee for the Seaboard Railroad as a whole would be handled by a hostile majority, much less than an appeal to the Internal Executive Committee, president, or directors, would be accorded any hostile treatment. Thus no reason was alleged and none, of course, shown on the motion for summary judgment why an appeal as provided for in the constitution would be nugatory for any reason of bad faith or any other improper motive.

Petitioners point out that in the instant case there was no motion for summary judgment and no proof whatsoever. Petitioners would have been glad for an opportunity to show bad faith on the part of The Brotherhood by actual evidence.

The very next case which the Fifth Circuit decided cited **Fingar** and was decided flatly in favor of Petitioners' position here. In **Calagaz v. Calhoun**, 309 F. 2d 248 (5th Cir., 1962), the Fifth Circuit at pp. 259-260 said:

The plaintiff, however, alleged in his complaint that action to obtain relief through union procedures would be "futile" because the individuals who were named as defendants and whose actions the plaintiff complains of, are officers of National and are in control of all channels of relief the plaintiff might have in the union. See *Fingar* . . . The plaintiffs are not compelled to exhaust the internal remedies of their union when their appeal would have to be made to the very officers against whom their complaint is directed (emphasis supplied).

This word "futile" was echoed in *Thompson v. New York Central*, *supra*.

From the allegations in the instant complaint it is obvious that Petitioners would continue to be discriminated against all the way up the line, even if there were practical internal remedies and even if Petitioners pursued these all the way to the top. To go all the way in the face of the initial intimidations faced by Petitioners would be the ultimate in futility.

Another case holding that an appeal through internal remedies would be a futility and unnecessary because the appeal would be to a body whose actions were challenged is *King v. Randazzo*, 234 F. Supp. 388 (E. D. N. Y. 1964), affirmed and modified on other grounds at 346 F. 2d 307 (2nd Cir., 1965).

In *Libutti v. Di Brizzi*, 337 F. 2d 216 (2nd Cir., 1964) (opinion adhered to on rehearing, 343 F. 2d 460), some language used by Chief Judge Lumbard sheds light on when the exhaustion of internal remedies is unnecessary. The *Libutti* case was decided under 29 U. S. C., § 411 (a) (4), which expressly gives a Union the right to require members to exhaust internal Union remedies before resorting to suit in the courts. Discrimination was not alleged

or discussed in the case. However, the constitution and by-laws provided eligibility requirements for election to office. The Union's Executive Board arbitrarily changed these requirements just before an election, and the court held that such a change violated the plaintiff's right to nominate a candidate, which right is guaranteed by L. M. R. D. A. As to the issue of the requirement that plaintiff must exhaust internal remedies, Judge Lombard held such a requirement "void", and held that the general rule is not "absolute" under the common law, and said further at p. 219 of 337 F. 2d, that "among the traditional exceptions" to the general rule of exhaustion of remedies "is the situation in which the action complained of is void." Judge Lombard further elucidated at p. 219:

When conceded or easily determined facts show a serious violation of the plaintiff's rights, the reasons for requiring exhaustion are absent; the commitment of judicial resources is not great; the risk of misconstruing procedures unfamiliar to the court is slight; a sufficient remedy given by the union tribunal would have to approximate that offered by the court. Where, as in this case, conceded facts show a serious violation of a fundamental right, we hold that plaintiffs need not exhaust their union remedies (emphasis supplied).

Petitioners respectfully agree with this highly respected Judge. His reasoning, his logic, and his language seem to be peculiarly applicable in this case. The court in **Thompson v. New York Central**, *supra*, and other courts, apparently have thought so too.

An earlier and similar case decided where a union member was disciplined without a hearing and brought suit without exhausting internal remedies is **Detroy v. American Guild of Variety Artists**, *supra*, p. 11. The court made the following comments regarding the exhaustion of remedies in that case in holding that the rule, even under the statute, was not absolute; at p. 78 of 286 F. 2d:

The recent case of **Vaca v. Sipes**, 386 U. S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903 (1967), recognizes that the courts are not completely divorced of the responsibility for curbing arbitrary and discriminatory Union and Company conduct. With regard to racial discrimination practiced by a Union against an employee, this Court in **Vaca** stated at 17 L. ed. 2d 853:

This Court recognized in **Steele** [discussed, *infra*, at p. 26] that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination . . .

For these reasons, we cannot assume . . . that Congress . . . intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

With regard to the exhaustion of remedies under the bargaining contract, this Court in **Vaca** observed at 17 L. ed. 2d 854-855, that:

. . . because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant.

If Respondents are ever forced to join issue on the question of the adequacy of the internal grievance machinery, Petitioners can prove as a fact that the Frisco and the Union have a bargaining contract which provides that no grievance whatsoever can be processed without the ap-

---

p. 400; 24 Maryland L. Rev. 113 (1964), Herring, "The 'Fair Representation' Doctrine: An Effective Weapon Against Union Racial Discrimination?"

approval of the Local Committee of the Union. All grievances are completely controlled by the Union and the Company. Again the question: does a plaintiff in a Federal Court have to allege each minute detail of administrative inadequacy (the complaint could be longer than the collective bargaining agreement and the Union Constitution), in order to show a standing to complain, or is there some burden on defendants to challenge the standing by affirmative facts to show the adequacy of the extra-judicial remedies? If plaintiffs are to be denied their day-in-court under such circumstances, it appears apparent that, as a practical matter, the Union and the Frisco will be left perfectly free to practice racial discrimination against them, and at the same time will be left perfectly free to refuse fairly to process their grievances. As stated in *Vaca* at 17 L. ed. 2d 855:

To leave the employee remediless in such circumstances, would, in our opinion, be a great injustice.

In further examining the circumstances under which an employee might obtain judicial relief without exhausting internal remedies to a fruitless end, this Court in *Vaca* stated at 17 L. ed. 2d 855:

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. . . . In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action (emphasis supplied).

Petitioners alleged in their original complaint (Appendix p. 58) that there was a "tacit understanding" and "sub-rosa agreement" between the Frisco and the Union to practice racial discrimination against Petitioners; and Pe-

tioners further alleged in their amended complaint (Appendix p. 69) that when they attempted to process their grievances:

they were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed", but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs Negro and white.

Under these circumstances and in the face of such allegations, the Company should be "estopped by its own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action." *Vaca v. Sipes, supra*. The Union should, likewise, because of its conduct be estopped to rely on such a defense. It is, in fact, totally incomprehensible how a Company and a Union acting in concert to practice racial discrimination could be allowed to rely on the technical defense of non-exhaustion of internal remedies. It is especially incomprehensible how a Company and a Union conducting themselves in such a manner could be allowed to rely on such a defense when they themselves negotiated the contract which places the processing of grievances within their complete and exclusive control.

This Court in *Vaca*, in addition to the theory of estoppel, pointed out still another situation in which the exhaustion of internal remedies to a complete and endless end is not a prerequisite to court action. This Court stated at 17 L. ed. 2d 855:

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole

power under the contract to invoke the higher stages of the grievance procedure, **AND** if, as alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's **WRONGFUL** refusal to process the grievance (Court's double emphasis) (single emphasis supplied).

. . . . .

Nor do we think that Congress intended to shield employers from the natural consequences of breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. *Richardson v. Texas & N. O. R.*, 242 F. 2d 230, 235, 236 (C. A., 5th Cir.)<sup>1</sup>

As already pointed out, Petitioners in the instant action have clearly alleged facts showing that the Union and the Company "wrongfully" refused to give honest consideration to their grievance, and even laughed at them and intimidated them. In light of *Vaca* does the law deny to Petitioners the opportunity to prove their allegations and shield Unions and Companies from the natural consequences of their wrongful conduct in conspiring to practice racial discrimination? Petitioners submit not.

The Alabama law on the subject of exhaustion of contractual remedies is stated favorably to Petitioners in

---

<sup>1</sup> The Second Circuit correctly applies *Vaca v. Sipes* in *Desrosiers v. American Cyanamid*, 377 F. 2d 864 (1967), where at p. 871 it says:

Thus, as the record stood when the motion to dismiss and for summary judgment was granted . . . Desrosiers' claim of breach of duty of fair representation on the part of the Union and his further claim that his employer had acted in collusion with the Union to deny him his rights stood unimpeached and uncontradicted. The employer and the Union for the first time were both before the Court as defendants as *Vaca v. Sipes* indicated they should be. Desrosiers was entitled to prove his allegations . . . if he could; if proven they might well be sufficient to overcome the employer's defense of failure to exhaust contract grievance procedures.

**Alabama Power Co. v. Haygood**, 266 Ala. 194, 95 So. 2d 98 (1957).

The analysis of the National Railroad of Adjustment Board cases, *infra*, also may shed some light upon the constitutional requirement of "due process", as it is applied to the requirement of exhaustion of contractual and internal union remedies where they would be a mere formality and a futility. While the foregoing cases, except perhaps **Libutti**, did not deal directly with this constitutional question, always implied in the words "futility", "inadequate", "illusory", "uncertain", are a consideration of the rules of fair play inherent in the "due process" clause of the Constitution of the United States.

#### **The National Railroad Adjustment Board:**

Petitioners respectfully point out that in **Walker v. Southern R. Co.**, 385 U. S. 196, 17 L. ed. 2d 294, 87 S. Ct. 365 (1966), rehearing denied 385 U. S. 1020, 17 L. ed. 2d 559, 87 S. Ct. 699, cited by the Fifth Circuit in its opinion in this case, this Court recently refused to apply **Republic Steel v. Maddox** to agreements governed by the Railway Labor Act. Therefore, it would appear that only the real question here as to extra-judicial remedies may be whether petitioners must pursue their N. R. A. B. remedy and not whether they must exhaust all three possible extra-judicial remedies.

**Milstead v. Atlantic Coast Line R. Co.**, 273 Ala. 557, 142 So. 2d 705 (1962), cert. denied 83 S. Ct. 189, 371 U. S. 892, 9 L. ed. 2d 124 (1962), commented upon favorably in 15 Ala. Law Review 626, Spring 1963, is the leading Alabama case on the subject of exclusive jurisdiction in the N. R. A. B. where Company-Union discrimination is alleged. The only real difference between the instant case and the **Milstead** case is that the collusive discrimination here is racial, whereas the discrimination

in that case was a matter of union politics. The Alabama Supreme Court held that the doors of a *nisi prius* court were open where claims of invidious discrimination were made. The same arguments advanced by Respondents in the District Court and the Court of Appeals were advanced in the **Milstead** case by the Union and the Company. Realizing that this Honorable Court may not feel bound by this latest Alabama decision on the jurisdictional question, Petitioners will explore the background of the problem, and the applicable federal cases.

Title 45, § 153, U. S. C. A. (part of the Railway Labor Act) is the statute which originally created the N. R. A. B. in 1934. The N. R. A. B. is divided into four divisions, each holding sway over a different classification of employees. The division which purportedly would have jurisdiction over this dispute consists of ten members, five of whom are selected and designated by the national railway labor organizations and five by the carriers. Each member of the board is compensated by the party which he "represents". The jurisdictional provision is as follows:

(i) The disputes between an employee or group of employees and the carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning local rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, but failing to reach an adjustment in this manner, the disputes may be referred . . . to the appropriate division of the Adjustment Board with the full statement of the facts and all supporting data bearing upon the disputes.

The first major case to be decided on the alleged exclusiveness of N. R. A. B. jurisdiction over employee-employer disputes involving the interpretation of collec-

tive bargaining agreements, was **Moore v. Illinois-Central R. Co.**, 312 U. S. 630, 61 S. Ct. 754, 85 L. ed. 1089 (1941). The contention was there made by the Company that a discharged employee had failed to exhaust the administrative remedies provided by the Railway Labor Act. Mr. Justice Black, speaking for the Court, at page 1092 of 85 L. ed., said of the Act:

But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court.

Thereafter there developed a line of cases which, it is argued, conflicts with the philosophy stated in the **Moore** case, although the new cases did not expressly overrule **Moore**. The leading case of this line was **Slocum v. Delaware L&W R. Co.**, 339 U. S. 239, 70 S. Ct. 577, 94 L. ed. 795 (1950). The basic holding of all of these **Slocum**-type cases is that a person, still in the employ of a carrier, as distinguished from a person accepting a wrongful discharge and suing for damages as in the **Moore** case, must pursue the remedy provided him by the N. R. A. B., which has been called "a congressionally designated agency peculiarly competent in this field." See **Slocum**, *supra*, at page 800 of 94 L. ed.

Then came a counter-balancing trend, manifested in **Steele v. Louisville & Nashville R. Co.**, 323 U. S. 192, 65 S. Ct. 226, 89 L. ed. 173 (1944). In this case, a Negro fireman, represented by the Fireman's organization because of its majority status among his class of employees, sued both the Company and the Union to enjoin the enforcement of a new agreement which was allegedly discriminatory against him and others similarly situated. **Steele** did not attempt to take his grievance before the N. R. A. B., but rather sued in an Alabama *nisi prius* court. At page 181 of 89 L. Ed., this Court said:

But we think the Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

At page 185 of 89 L. ed., this Court continued as follows:

Section 3 First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements," makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, the Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than four hundred cases to entertain grievance complaints by individual members of a craft represented by a labor organization. "The only way that an individual may prevail is by taking his cause to the Union and causing the Union to carry it through to the Board." Administrative Procedure in Government Agencies, S. Doc. No. 10, 77 Cong., 1st Sess., Pt. 4, p. 7. Whether or not judicial power might be exerted to acquire the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since Section 3, First (c) permits the national labor organizations chosen by the majority of the crafts to "prescribe the rules under which the labor members

of the Adjustment Board shall be selected" and to "select such members and designate the occasion on which each member shall serve," the Negro fireman would be required to appear before a group which in large part is chosen by the respondents against whom their real complaint is made. In addition, Section 8, Second, provides that a carrier and a craft or crafts of employees, "all acting through their representatives, selected in accordance with the provisions of this Act," may agree to the establishment of a Regional Board of Adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way, the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply "the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available before either of these tribunals, would constitute an adequate administrative remedy (emphasis supplied).

[Parenthetically, this reasoning would apply equally to illusory internal administrative remedies controlled by the Company or the Union.] In the *Steele* case, the Supreme Court went on to hold that the *nisi prius* court had original jurisdiction under the circumstances.

Further enlightenment came from Mr. Justice Frankfurter's concurring opinion in *Pennsylvania R. Co. v. Ryehlick*, 353 U. S. 480, 77 S. Ct. 421, 1 L. ed. 2d 480 (1957). Mr. Justice Frankfurter admitted the "exclusion of the courts from this process of collaborative self-government" involved in N. R. A. B. proceedings, consistent with the *Slocum* rationale, but then said:

There is one qualification to the principle I have stated, or rather there is a counter-principle to be

respected. This is the doctrine established by *Steele v. Louisville & N. R. Co.*, 328 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226. The short of it is that since every railroad employee is represented by Union agents who sit on a System Board of Adjustment, such representatives are in what amounts to a fiduciary position: they must not exercise their power in an arbitrary way against some minority interest. . . . the bargaining representatives owe a judicially enforceable duty of fairness to all of the components of the working force when a specific claim is in controversy.

Also extending the *Steele* case was the case of *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955), cert. den., 350 U. S. 967, 76 S. Ct. 436, 100 L. ed. 839 (1956). Mount was an employee who sued to enjoin his Brotherhood from negotiating a seniority agreement that he alleged was "unfair, arbitrary and an unlawful act of favoritism." He had not bothered himself in the morass of internal procedures provided by the Union constitution. Applying the *Steele* case, the Sixth Circuit held at page 607 of 226 F. 2d as follows:

We are of the opinion that if the Brotherhood is engaged in hostile discrimination against a portion of the membership of the craft, without a good faith representation of the entire membership of the craft, in making contracts with the employer, the employee so affected has a cause of action . . . .

The Sixth Circuit was here saying that where a railroad Union discriminates against its own members, the members can immediately turn to the courts for relief against the prejudicial treatment and need not go to the N. R. A. B., or anywhere, else as a prerequisite. It is noted that this Court refused to review the *Mount* decision.

Then in 1957 this Honorable Court, in one of its unanimous decisions, decided *Conley v. Gibson*, 355 U. S. 41.

78 S. Ct. 99, 2 L. ed. 2d 80 (1957). In that case, Negro railroad employees sued their Brotherhood for a declaratory judgment, an injunction, and damages for failing to represent them fairly in circumstances where the railroad had abolished jobs and given them to white employees, the true intention of the Brotherhood being to violate the rightful seniority status of the plaintiffs as provided by the pre-existing contract. The District Court had dismissed the suit on the ground that the jurisdiction of the N. R. A. B. was exclusive, and the Fifth Circuit had affirmed. The Supreme Court reversed the Fifth Circuit and held that the Railway Labor Act did not give the N. R. A. B. exclusive jurisdiction over the controversy. More particularly at page 84 of 2 L. ed. 2d, this Court said:

The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination.

At page 85 of 2 L. ed. 2d, the Court made the following statement, peculiarly applicable to the situation here presented:

The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those he represents does not come to an abrupt end as the respondents seem to contend with the making of an agreement between the union and the employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements and the protection of employee rights already secured by the contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. The contract may be fair and impartial on its face yet it administers in such a way with the active

or tacit consent of the Union, as to be flagrantly discriminatory between some members of the bargaining unit (emphasis supplied).

Respondents in the instant case advanced the idea before the Court of Appeals that the **Steele** case is limited to circumstances where collective bargaining agreements are discriminatory in the first place, or when the agreements are themselves unlawful in terms or effect, and is not applicable when the contract is being relied on as valid but being discriminatorily applied. The case which once stood for this proposition is **Hayes v. Union Pacific R. Co.**, 184 F. 2d 337 (9th Cir., 1950), which held, at page 338 of 184 F. 2d, as follows:

It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect that federal courts may act.

This Court in **Conley**, *supra*, in footnote No. 4, at page 84 of 2 L. ed. 2d, clearly overruled the **Hayes** case as follows:

The courts below also relied on **Hayes v. Union Pacific R. Co.** (CA 9th, Cal., 184 F. 2d 337, cert. den., 340 U. S. 942, 95 L. ed. 680, 71 S. Ct. 506), but for the reasons set forth in the context we believe that case was decided incorrectly (emphasis supplied).

Nothing could be clearer.

Also contrary to **Hayes**, the Fifth Circuit in **Richardson v. Texas and New Orleans Railroad Co.**, 242 F. 2d 230 (C. A. 5th, 1957) (a case based on racial discrimination seeking damages for Negroes who had not been discharged, and cited with approval by this Court in **Vaca v. Sipes**, *supra*), totally rejected this type of argument and reversed the lower court which had held that the N. R. A. B. had exclusive jurisdiction. The Fifth Circuit in **Richardson** stated at p. 234:

While it is true that Section Five of the bargaining agreement, read in isolation and out of context from other portions of the complaint, is not discriminatory upon its face, the surrounding provable facts and circumstances make it discriminatory.

And further at p. 235:

... our re-examination of the jurisdictional issue convinces us that the **absence** of any **allegation**, as to the existence of a bargaining agreement discriminatory upon its face is not determinative, and does not foreclose judicial inquiry where the complaint seeks redress for discriminatory representation in violation of the bargaining union's implied statutory obligation to bargain impartially for all . . . (emphasis supplied).

It is impossible to square the Fifth Circuit's **Richardson** decision with the Fifth Circuit's opinion of December 5, 1967 in this case. It appears from the **Richardson** case that even if there were no allegations in a complaint that a written bargaining contract was *per se* racially discriminatory, the courts would not be ousted of jurisdiction when the circumstances in effect show that racial discrimination is, in fact, being practiced. In the instant case, Petitioners have alleged that a "tacit understanding" and "subrosa agreement" exists between the Frisco and the Union to discriminate against them. Petitioners seek damages and injunctive relief under such **unwritten** contract and for such discrimination; they do not seek, need, or require the interpretation of the written collective bargaining contract. Under the rationale of the **Richardson** case, judicial inquiry is not foreclosed to them where they seek "redress for discriminatory representation."

As to the Frisco, both the **Vaca** and **Richardson** cases, point out that Congress did not intend to shield employers from wrongful Union conduct in which the employer has

participated and joined. In *Richardson, supra*, at 236 of 242 F. 2d, the Fifth Circuit held:

It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful. (emphasis supplied.)

• • •

The Railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that, under the allegations of this complaint, it can be required to respond in damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy which it is supposed to effectuate.

When *Hayes* was overruled by this Court in *Conley*, and when the *Richardson* case, decided by the Fifth Circuit, was cited with approval by this Court in *Vaca*, it is difficult to comprehend how it can longer be disputed that the Federal Courts have jurisdiction to redress racially discriminatory treatment of employees by Company and Union.

After *Conley*, logically followed *Choate v. Grand International Brotherhood of Locomotive Engineers*, 159 Tex. 1, 314 S. W. 2d 795 (1958), which correctly applied *Steele* and *Conley* and held that the mere fact that the Company is a co-party-defendant and that the meaning of the contract is involved does not oust the *nisi prius* court of jurisdiction. To like effect is *Cunningham v. Erie R. R. Co.*, 266 F. 2d 411 (2nd Cir. 1959), where the Second Circuit held as follows:

If the District Court has jurisdiction to proceed against the Union, it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments.

The Fifth Circuit in 1962 (as in **Richardson** completely inconsistent with its opinion in the instant case), applied **Conley** in **Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co.**, 305 F. 2d 605 (5th Cir., 1962), and flatly disagreed with the contention that N. R. A. B. jurisdiction was exclusive over a controversy between employee and company where there were grounds alleged to take it away from the N. R. A. B. That Court at p. 607 of 305 F. 2d said:

\* \* \* the relief to be accorded may not be any less than reasonably required though it might mean that Byington, in a personal way, might reap some of the benefit of the judicial decree and thereby obtain indirectly some of the benefits we hold he may not secure directly.

Considering that a complaint must be read in the light of the principles recently restated in **Conley v. Gibson**, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80, and so often reiterated by us almost to the point of despair, we think that a direct, positive charge is made that the purpose of the Railroad in the ostensible disciplinary investigative proceeding is to thwart Byington's (and the Brotherhood's) effectiveness as a collective bargaining agent for the Trainmen. Whether this can be established by evidence is quite a different thing. But at this stage, on the pleadings only, and in advance even of evidence brought forward in receivable form on motion for summary judgment to establish that there is in fact no genuine controversy over the fact, the Trial Court could not determine the fact to be otherwise.

See, also, **Hosteller v. Brotherhood of Railroad Trainmen**, 287 F. 2d 457 (4th Cir., 1961), where the Fourth Circuit found the doors of the court open where discrimination by the bargaining agent was alleged.

It is interesting that the most recently decided cases, like **Thompson v. New York Central**, *supra*, p. 12, decided on January 28, 1966, where railroad employees have complained against both Union and Company, the defendants have not even argued preclusive jurisdiction in the N. R. A. B. In deciding why there is no longer much argument, it may be fruitful to comment in more detail upon the N. R. A. B. as the tribunal proposed by Respondents for the hearing of this complaint. There are four points that perhaps need to be discussed on this subject.

#### Point No. 1.

In the first place, the N. R. A. B. has absolutely no jurisdiction, either express or implied, to redress any wrong or to correct any discrimination perpetrated by a Union against an Employee either by the Union itself or in concert with the Company. As already quoted from the **Steele** case, at page 185 of 89 L. ed., this Court said:

Section 3, First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements," makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, the Board could not give the entire relief here sought.

Also already quoted from the **Conley** case, at page 84 of 2 L. 2d:

The Adjustment Board has no power under Section 3, First (i) or any provision of the Act to protect them from such discrimination.

Repeating this holding from the **Conley** case, the Supreme Court of Texas, in the **Choate** case, at page 798 of 314 S. W. 2d, said:

It will be noted that the Act refers only to "disputes between an employee or group of employees and the carrier or carriers." Controversies between railroad employees and their union are thus not included in the jurisdiction granted thereby.<sup>1</sup>

### Point No. 2.

In the second place, even if the N. R. A. B. had jurisdiction to grant all of the relief requested in the instant case, it is predictable with 100% accuracy that the N. R. A. B. would not decide this case in favor of lone employees when their grievance is against both the Union and the Company. The tribunal is "stacked" by definition.

In addition to what the *Steele* case says on this point, Mr. David Levinson, associate professor of economics at Ohio University, in his article "Legal Aspects of the National Railroad Adjustment Board," at 4 *LABOR LAW JOURNAL* 685 (1953), at page 692, sheds considerable light on N. R. A. B. procedures, as follows:<sup>2</sup>

If the grievor individually processes his claim at the carrier level and then attempts to proceed in the same manner before the Board, it might be contended that the Board's refusal to hear his claim is based precisely upon the fact that it is not submitted in accordance with the law, for the R. L. A. specifies that disputes at the carrier level "shall be handled in the usual manner . . ." (R. L. A., See Sec. 3 First (i)). Presumably it is the union which handles the case when it is done in the usual manner. But in accord-

---

<sup>1</sup> See also, Kroner, *Minor Disputes Under the Railway Labor Act: A Critical Appraisal*, 37 N. Y. U. L. Rev. 41 (1962) at 47-48.

<sup>2</sup> See also, *Id.* at 48; Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N. Y. U. L. Rev. 362 (1962) at 388, note 124.

ance with statutory construction, the various components of the law, if it is feasible to do so, should be integrated, rather than antagonized. Aside from the contrary implications of the Supreme Court's opinion in the above mentioned Elgin case, if this contention holds, it follows that the grievor's right to individually present his case to the Board (R. L. A., Sec. 3, First (j)) is of no account. The term usual manner must refer to the usual steps in the grievance procedure rather than to the usual party that processes the grievance.

The kind of justice the grievor may expect from a Board in which the carrier members presumably are aligned with the party adversary to his grievance, and in which the labor members resent the imposition of his case upon them through court order, is a matter for speculation. The labor members might be constrained to act judiciously if decisions of the Board were to have any precedent, but that matter in itself appears to be one of controversy and bafflement. Following the general rule concerning prejudice in administrative bodies, it might be suggested that such prejudice does not disqualify the Board since its orders are not self-executory—that is, an opportunity is afforded for court review in an enforcement proceeding (R. L. A., Sec. 3, First (p)). But such proceedings may be initiated only by the beneficiary of a Board award (or his agent), as is discussed below. The employee in question could not be so designated because the Board presumably would deny rather than sustain his claim. If judicial relief from the Board's prejudice is available to the employee, it is probably based upon the allegation of violation of due process (emphasis supplied).

Mr. Lloyd K. Garrison, Dean of Wisconsin Law School and referee in more than one hundred early cases decided

by the N. R. A. B. where the Union and Company members were deadlocked, in his article, "The National Railroad Adjustment Board — A Unique Administrative Agency" 46 YALE LAW JOURNAL 567 (1937) discussed the background and functions of the N. R. A. B. during its first years of operation. At page 577 of 46 YALE LAW JOURNAL, in discussing procedures, Mr. Garrison said:

The claim will normally be taken up by the local chairman of the union with the appropriate local railroad official . . . The union serves written notice on the appropriate division of the Board (emphasis supplied).

It is obvious that the historic function of the N. R. A. B. has been to decide conflicts between the Companies and the Unions. The grievants have always been either Companies or Unions, not individuals, particularly not individuals discriminated against by both Company and Union. The rationale of the *Slocum* case, which found that the N. R. A. B. was an "agency peculiarly competent in this field," breaks down when an attempt is made to apply it to cases like the instant case. The Supreme Court in the *Steele* case, at page 185 of 89 L. Ed., cited, as illustrative of the inadequacy of the administrative remedy provided by the N. R. A. B., the case of *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243 (1927). That case was one which held that an accused is unconstitutionally deprived of due process of law if subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him. In the instant case, five of the would-be "judges" receive their remuneration from carriers. Five of the would-be "judges" receive their remuneration from unions. From the history of the N. R. A. B., it is obvious that in order to keep their jobs these "judges" must in all cases decide in favor of the position taken by the parties they "represent." Section 153 (g) of the Railway

Labor Act says: "Each member of the Adjustment Board shall be compensated by the party or parties he is to represent" (emphasis supplied). The fact that a grievant theoretically can pursue his administrative remedy alone even when not represented by his Union is no real help. Hand-in-glove cooperation between Union and Company means that plaintiffs' chances would be nil if they sought to pursue this alleged "administrative remedy." The N. R. A. B. would have available any one of a dozen technicalities, any one of which it might seize (or it might not give a reason at all), and after five years of delay, Petitioners would not be as far along as they are right now.

### Point No. 3.

In the third place, a judicial review, if any, of a decision of the N. R. A. B. adverse to an individual claimant is so limited (if it exists at all) as to make even more conclusive Petitioners' contention here of a lack of the constitutionally required "due process" under the instant circumstances. Mr. David Levinson has already made the point in the quotation above, *supra*. Again, at page 696 of 4 LABOR LAW JOURNAL he outlines the case law as follows:

numerous cases are reported in which an employee who was denied his claim by the Board has turned to the courts to upset that award or has sought to litigate—in a claim for damages, for example—the same question which the Board has entertained in denying him his claim. Although there are some lower court decisions to the contrary, the overwhelming weight of court opinion holds to the denial of relief on the ground that the Board's award is final and binding (emphasis supplied).

In *Coats v. St. Louis-San Francisco Railway Co.*, 230 F. 2d 798 (5th Cir., 1956), the Fifth Circuit agreed with the

argument well and vigorously made by present counsel for the Frisco that the finding of the N. R. A. B. was final and binding on an employee **AND NOT REVIEWABLE**. This holding in the *Coats* case is no more than a preview of what Mr. Justice Frankfurter again said in the *Rychlick* case, *supra*, p. 28, at page 491 of 1 L. Ed. 2d, where he nailed it down for all time.

The determination of the System Board [an elective substitute for the N. R. A. B.] on the merits is not open to judicial review, **even on so-called legal questions**. It is not for a court to say that a complaint against the System Board must fail because the System Board rightly held against the complaint. Right or wrong, a court has no jurisdiction to review what the System Board did, unless a complaint asserts arbitrariness and seeks to enforce the limited protection established in the *Steele* case (emphasis supplied).

It is certainly understandable why Respondents in the instant case want to hurry Petitioners off to Chicago (the home of the N. R. A. B.) by making the innocent-eyed assertion that Petitioners must "exhaust their administrative remedies". It would be laughable for Petitioners to go to Chicago at considerable expense and great expenditure of time, knowing in advance that this administrative tribunal, as it was historically conceived, as it is actually constituted, and as it has in fact functioned, will turn them down as surely as night follows day, and that they will then have reached the end of the road, a blind alley. If they are forced to take their lumps before the N. R. A. B. after a long and frustrating wait, and they should thereafter attempt to come again to the lower court, they would undoubtedly be faced with the proposition, inconsistent with that now inferentially presented by Respondents that the N. R. A. B. not only acted within its exclusive pre-

rogative, but that its decision is final, binding, and not reviewable.

This dilemma of a prejudiced tribunal without adequate judicial review was commented on by the Court of Appeals for the Second Circuit in the *Rychlick* case, 229 Fed. 2d 171, on its way to the Supreme Court. That Court held that the System Board (an elective substitute for the N. R. A. B. under the Railway Labor Act, having identical jurisdiction) had exclusive jurisdiction to determine whether a union attempting to obtain representation on the Board was "national in scope" and therefore entitled to representation, even though the petitioning union was not represented on the Board at the time the petitioner was, in effect, trying to unseat one of the Board members already seated and actively representing a rival union. The basis for its decision that such a procedure was not a *per se* unconstitutional denial of due process was its perhaps erroneous conclusion that there must be some kind of implied judicial review. At page 175 of 229 Fed. 2d, the Court said about the alleged absence of judicial review:

Nothing could more completely defeat the most elementary requirement of fair play . . . especially when we remember that the union members of the "System Board" are likely to be persons of consequence in the union itself.

It will be remembered that Mr. Justice Frankfurter later in this same case, on its appeal to this Court, said that there was no judicial review. This simply echoes that without adequate judicial review a forced appearance before a prejudiced tribunal defeats the most elementary requirement of fair play and violates due process and the equal protection of the law.

In *Pennsylvania Railroad Co. v. Day*, 360 U. S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959), this Honorable Court

continuing the line of cases beginning with *Blocum*, held that the N. R. A. B. had exclusive primary jurisdiction of an employee's claim for back pay even after he had retired. The case did not involve a charge of mistreatment by the Union or by the Company but only sought an interpretation of the collective bargaining agreement. Three Justices disagreed with the majority and said that the area of exclusive jurisdiction of the N. R. A. B. should be constricted rather than expanded. Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas, based their dissent in part upon their feeling that the absence of judicial review of a denial by the N. R. A. B. of an employee's claim, whereas an N. R. A. B. decision in favor of a railroad can be tried *de novo*, amounts to a denial of the constitutional requirement of equal protection. At page 1429, et seq., of 3 L. ed. 2d, Mr. Justice Black, speaking for the minority, says as follows (almost paraphrasing Mr. David Levinson as quoted, *supra*):

But if external considerations are to be used to interpret the statute, I think that the "lopsided" effect courts have given to the Act's provisions for review of Board awards furnishes a very weighty reason for excluding retired employees from the exclusive jurisdiction of the Board. The Act provides that either a railroad worker or an employee can invoke the compulsory jurisdiction of the Adjustment Board. Section 3, First (m) states that "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money 'award.'" As construed, this provision prohibits an employee from seeking review of an adverse Board ruling in the courts. And courts, determining that a Board denial of an employee's money claim is not a "money award" falling within the exception of Section 3, First (m), have refused workers a judicial trial of their money claims against the railway after these have been re-

jected by the Board. Today's decision in *Union Pacific R. Co. v. Price*, 360 U. S. 601, 8 L. Ed. 2d 1460, 70 S. Ct. 1351, appears to adopt this position. In contrast, however, a railroad may obtain a trial substantially de novo of any award adverse to it. For, under Section 3, First (p) of the Act, if a carrier does not voluntarily comply with the Board's award, including wage awards for money damages, a wage earner can enforce the Board's order only by bringing, in a United States District Court, a suit which "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the adjustment Board shall be prima facie evidence of the facts therein stated . . .

Construed this way, the Act creates a glaring inequality of treatment between workers and railroads. After denial by the Adjustment Board workers can get no judicial trial of their claims; railroads, however, can get precisely the same kind of trial they would have were there no Adjustment Board, except that the Board's findings constitute prima facie evidence in the case. For the reasons stated by Mr. Justice Douglas in his dissent in *Price*, I think the Railway Labor Act should be construed to grant a railroad employee the same kind of redetermination by judge and jury of a Board order denying him a "money award" that the Act affords a railroad for a money award against it. The Court rejected this view in *Price*. The unfairness of the discriminatory procedure there upheld seems manifest to me. In my judgment, it is bound to incite the kind of bitter resentment among railroad workers which will produce discord and strikes interrupting the free flow of commerce and creating the very evil Congress sought to avoid by this Act. These reasons seem to me to provide compelling arguments against judicial expansion of

the Act to retired railroad workers plainly not covered by its language.

If this Court still holds to the view that there is no judicial review of an N. R. A. B. decision adverse to an employee, it would suggest that this Court (which was unanimous in **Conley**) would go along with the reasoning of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Warren in **Pennsylvania v. Day**, *supra*, to allow a direct submission of the subject matter of the instant complaint to a court of law under the line of cases beginning with **Steele** and culminating in **Conley**. A perfect rationale is readily available to this Court without doing violence to one of its prior decisions. This Court should not say of the instant case (to use the language of **Bloom**), that the N. R. A. B. is a tribunal "peculiarly competent" to hear a case where both the Railroad and the Brotherhood are accused of discriminatory treatment of the claimant. Avoiding this notion of special expertise in the statutory tribunal, Mr. Michael I. Sovern in 62 **Columbia L. Rev.** 563 (1962), "The National Labor Relations Act and Racial Discrimination", at p. 611, says:

In fact, the duty of fair representation has so far been enforced almost exclusively by the courts and they must remain in the field to deal with cases arising under the Railway Labor Act . . . (emphasis supplied).

Perhaps the "pros" and "cons" of exclusive N. R. A. B. jurisdiction is best summarized by a quotation from Mr. Lloyd K. Garrison, at 46 **YALE LAW JOURNAL** 598:

Those trained in the law may be shocked by the very idea of a quasi-judicial tribunal deciding rights upon a hearsay record without witnesses. They may be equally disturbed by some of the procedures and particularly by the absence of judicial review. Yet it is difficult to conceive of the Board's being able to

discharge its functions under any set up which would fit within their traditional legal concepts. Yet the Board's functions are essential ones and the point is that they are not exclusively, and perhaps not primarily, functions of dispensing justice in the orthodox sense, for in the broadest view the Board is an instrument for making collective bargaining agreements work and survive (emphasis supplied).

When Mr. Garrison wrote this, he was assuming that the actual protagonists before the Board would invariably be, as he had witnessed, the Carrier on the one hand and the Union on the other. In cases that do not fit such a mold the "shock" he spoke of is so great as to be tantamount to a lack of due process.

#### Point No. 4.

Fourthly, in recent years, not only has there been an evolution in the direction of judicial relief where administration relief is wholly inadequate because of charges of invidious discrimination, but there have been major investigations by Congressional committees into labor-management collusion and conspiracy, resulting in the enactment of the Labor-Management Reporting and Disclosure Act. In addition, there has been the recent enactment of the Civil Rights Act of 1964, although not specifically invoked by Petitioners. Altogether, there has now been firmly fixed a new body of public policy condemning invidious discrimination against an employee, particularly where his claim is arbitrarily not being pressed by his own Union. The nation is tired of the hideous practice of Union and Company "getting together" at the expense of certain employees not in the favored status. This growing public policy both explains and adds to the weight of the decisions moving away from an exclusive prerogative in the N. R. A. B. in cases where the Union is joining in a pattern of discrimination against the employee.

Reflecting this mood, writers Mr. Benjamin Aaron and Mr. Michael I. Komaroff in "Statutory Regulation of Internal Union Affairs-I", 44 Ill. L. Rev. 425 (1949), at pp. 431 and 437 condemn the practice of many railroad unions, including the Brotherhood of Railway Carmen of America, to limit the union participation of Negroes to "Jim Crow" auxiliary bodies [true here]; at p. 433 condemn the fact that Negroes are denied the privilege of participating in the administration of the N. R. A. B. because few or no unions with a predominately Negro membership have been found to be "national in scope"; and at p. 463 in general criticize the entire Railway Labor Act because:

... the fact remains that it has been administered in such a way as frequently to defeat the principles of self-determination of representatives and of collective bargaining. As a result, large numbers of Negro workers have been deprived of democratic privileges and of valuable job rights accumulated over the years.

### RECAPITULATION.

There are basically five reasons why a writ of certiorari should here be granted by this Honorable Court:

A. The reliance by the Court of Appeals for the Fifth Circuit on **Republic Steel v. Maddox**, *supra*, p. 12, indicates a mischievous tendency by the lower federal and state courts to interpret **Maddox** too broadly and to apply it indiscriminately even to cases where the grievance machinery is ineffectual because of hostility both of Union and Company. This tendency to misinterpret **Maddox** should not be allowed to reach full flower.

B. The full implication of **Conley v. Gibson**, *supra*, p. 29, has not been comprehended by some of the lower courts. There is still conflict and confusion among the Circuits as to the exclusivity of the N. R. A. B. procedure where Union and Company are working together to perpetuate or to perpetrate invidious discrimination. One example of this con-

dict, among many, is **Howard v. St. Louis-San Francisco Railway Company**, 361 F. 2d 905 (8th Cir. 1966) (relied upon by the Fifth Circuit here), which does not square with the reasoning of the Fifth Circuit in **Richardson v. Texas & New Orleans Railroad Company**, *supra*, p. 31, and **Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.**, *supra*, p. 34. Another example is the complete dissimilarity between the Fifth Circuit's opinion in this case and the Second Circuit's opinion in **Desrosiers**, *supra*, p. 23.

C. The national scope of the problem of racial discrimination in employment and particularly in seniority and promotion practices requires a larger measure of judicial responsibility than some courts apparently are willing to give. Courts of first impression must be made to realize that for a Negro to be blithely told to invoke his Union Constitution and to struggle through Company grievance procedures and to go to the N. R. A. B. (all without free legal counsel, as would be available under the N. L. R. B., and all in face of overt opposition from his own Union and Company) is not a legitimately required exhaustion of administrative remedies, rather a denial of "due process".

D. The lower courts urgently need a clarifying Supreme Court opinion as to the burden which must be carried by employee, Union and Company, on the question of the alleged futility in an attempted exhaustion of administrative remedies under circumstances where there the employee alleges cooperative Union-Company hostility and discrimination. The implication in the opinions rendered in this case thus far is that if there is any excuse for failing to exhaust all possible non-judicial remedies, the employee must set out in his complaint the entire Union Constitution and By-Laws and the entire Collective Bargaining Agreement, and must point specifically to their deficiencies under his particular circumstances. Other decisions.

here discussed, indicate that there is a responsibility for pleading and proof also on the Union and the Company. This problem calls for immediate attention from the Supreme Court, so that there will be a well understood guideline for the future on where this burden lies and whether it is a burden of pleading or of pleading **and** proof.

E. One question left unanswered by the courts below and upon which there has been a confusion of pronouncement, or an absence of pronouncement, is the question of which alleged administrative remedy must be pursued first if, as the Fifth Circuit says here, they must all be pursued. To add to the confusion, one administrative tribunal might reason that the exhaustion of another administrative remedy is a prerequisite to its administrative consideration of the claim. Double and triple non-judicial remedies, invoked under circumstances of hostility, will surely stifle claims of Union-Company discrimination if this Court concludes that this type of claim needs a strongly inhibiting influence. The District Court's opinion, adopted by the Court of Appeals, would suggest this feeling by those courts. Both the District Court and the Court of Appeals very casually dismissed petitioner's complaint. Their opinions provided little illumination except of their attitude toward this kind of litigation.

### **CONCLUSION.**

In deciding the jurisdictional question, raised without affidavits on respondents' motions to dismiss, respondents granted for the sake of the argument that they are guilty of an "under-the-table" scheme of racial discrimination in their promotion practices. Yet they call themselves competent to decide petitioners' grievance. They are saying that Petitioners must suffer years of frustration inside the Union hierarchy seeking to obtain relief; and that **before, while or after** unsuccessful within the Union, they must also process their grievance with the Company without Union help; and that **before, while or after** unsuccessful

with the highest officer of the Company, they must go to Chicago and watch the N. R. A. B. preside over the burial of their claim, from which there is no resurrection. Any aggrieved employee in a free country, particularly when his grievance is based on racial discrimination, deserves better than this.

This case presents a peculiar instance of interracial cooperation by necessity. The futility and frustration felt by Petitioners, whether Negro or white, is the same. If the word "futile," as used in the decided cases, is to have any meaning or applicability, it must be applied in this case. The lower courts refused to equate "unavailability" and "inadequacy" under any circumstances, and have flatly said that to open the doors of the court to petitioners would "**sterilize procedures adopted to promote industrial peace**" (Appendix p. 66). Petitioners respectfully submit that these procedures were already sterile under the circumstances here alleged, and that Petitioners are not responsible for their sterility.

For the reasons given, Petitioners respectfully pray that a Writ of Certiorari be issued to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

**WILLIAM M. ACKER, JR.,**

**LYNN G. BALDWIN,**

**CARL ISAACS,**

**Attorneys for Petitioners.**

Of Counsel:

**SMYER, WHITE, REID & ACKER,**

**600 Title Building,**

**Birmingham, Alabama 35203.**

**Certificate of Service.**

I, William M. Acker, Jr., one of attorneys-of-record for petitioners, hereby certify that I have mailed a copy of the foregoing petition to Messrs. Cabaniss, Johnston, Gardner & Clark, First National Building, Birmingham, Alabama 35203, and to Messrs. Cooper, Mitch & Crawford, Bank for Savings Building, Birmingham, Alabama, 35203, attorneys-of-record for all respondents, by U. S. Mail, postage prepaid, this 2nd day of March, 1968.

.....  
William M. Acker, Jr.